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COMPLAINT AND JURISDICTION

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-2273

HERMAN DIAMOND, Petitioner,

versus

UNITED STATES, ET AL, Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner seeks certiorari to review a judgment of the Court of Appeals for the Fifth Circuit, and in support of its petition respectfully shows:

OPINION BELOW AND JURISDICTION

The case was tried before the Honorable Alexander A. Lawrence, United States District Court, Southern District of Georgia, who entered his Order on April 17, 1973, which is reported at____ _____

The Court of Appeals for the Fifth Circuit rendered its opinion on April 24, 1975, reported at 512 F.2d. 157
The Court of Appeals refused a petition for a rehearing on May 29, 1975.

The Order of the District Court, the

Opinion of the Court of Appeals, and the Order refusing the petition for rehearing are printed in the Appendix hereto.

Jurisdiction of this Court lies under 28 U.S.C. Statue 1254.(1)

QUESTIONS PRESENTED

The questions presented are:

1. The Court of Appeals has decided an important question of Federal law in a way which conflicts with applicable decisions of this Court, and has violated the sovereign rights of the State of Georgia and its citizens under Art. 10 of the United States Constitution and Art. 5 under due process and equal protection in a manner that is inconsistant with the Courts decision in ILLINOIS CENTRAL RAILROAD CO. VS. ILLINOIS 146 U.S. 436, 13 S.Ct.110, 36 L.Ed. 1018, which holds; that marshlands within the Petitioner's boundries belong absolutely to the Petitioner. And if not, should be settled by a definite decision of this Court.

STATUTE INVOLVED

The pertinent statute, Title 33 U.S.C. 403 of the Rivers and Harbors Act of 1899, is set forth in the Appendix, infra, page 5a.

STATEMENT OF CASE

On February 5, 1965, Petitioner Herman Diamond and Mr. Charles Wood, jointly

bought a two acre tract of land bordering on Richardson Creek, having a frontage of 500 feet on the North side of the Oatland Island Road and a depth of 300 to 400 feet to the low water mark of the creek.

The property is bounded on the West by two fixed bridges, one built in 1925 and has a vertical clearance of five feet and the other fixed bridge is 100 yards further west for the new expressway built in 1963 with a ten foot vertical clearance. (DX.2,3,4,5 Vol.1., 8/29/73), and on the East side is the old Government building.

The property was subdivided into 5 lots, selling 2 lots in 1965 to Mr. Tracy Dixon on the west side, leaving the middle lot for the Petitioner and Mr. Wood kept the two lots eastward.

On February 9, 1965 application was made for a permit to build a dock and forty-foot walkway to the high fast land just back of the creek bank. The permit was issued the following day and when the Petitioner picked the permit up at the Engineer's office, he also inquired for an application to bulkhead and fill. The District Engineer and the Chief of permits, both informed petitioner that a permit was not necessary as Petitioner was beyond the low water mark. The new bridge had changed the flow of current and was causing some erosion on the property of Petitioner. In 1966 Petitioner had a deep well dug near the walkway and the electric company installed a forty-foot pole for service to dock and water pump.

The Petitioner had bought the property with the intention of building a home and started to fill the high fast ground to reach an elevation of 12 feet in order to get a building permit. The total area involved was 1/3 of a acre, or 100 feet by a depth of 300 feet to low water. In 1969 the area involved was filled to 10½ feet elevation above M.H.Tide, and until March of 1973 when the dock burnt down, the Petitioner had not been active in the area.

When the dock burnt, inquiry was made to the Engineers to see if a new permit was needed to rebuild the dock. No permit was required and the Petitioner in repairing the dock placed the burnt debris in the washed out areas on the lot and covered it over with six loads of fill dirt. While in the progress, Dr. Fredrick Marland of the Georgia State Department of Natural Resources came by and had Petitioner arrested for filling marsh. The Marshland Act of 1970 was Expost Facto and Petitioner informed Dr. Marland of this fact which enraged him, and which led to the arrest. On March 22, 1974 in the Superior Court of Chatham County, Georgia, a jury of 12 found Petitioner "not guilty". On April 5, 1973 Dr. Marland filed a statement with the Clerk of the District Court that he had seen Petitioner fill the marsh and had violated the state act.

Mr. Lamar Walters, the Assistant United States District Attorney, filed a civil complaint on April 5, 1973 for temporary injunction and punitive damages in the name of the United States of America for vio-

lation of the Rivers and Harbors Act of 1899, Title 33 U.S.C. 403, 407 and 413, under jurisdiction 28 U.S.C. 1345. On April 17, 1974 Judgment charging Petitioner with violation of 33 U.S.C. 403 and permanently enjoining Petitioner from any construction or fill on the property.

The trial court found Petitioner in violation of 33 U.S.C. 403. App. 3a.

This Statue refers to obstruction of the channels of the navigable waters of the United States. Petitioner's marshlands are above and beyond the banks of Richardson Creek as clearly shown on the U. S. Geodetic maps and charts. DX 3, 4,5, 8/29/73 as stated in DeBardeleben Marine Corp. vs. United States, 5th Cir, (1971) 451 F. 2d 140. "What is for mariners to rely on may safely be used by judges."

These navigational charts clearly show the depth of the water in Richardson Creek at low tides.

Georgia Law, Section 85-1303 clearifies that Richardson Creek is not navigable as it does not carry any commerce, foreign or domestic or any trade whatsoever. App.7a.

Conflicting rules of decision within the Fifth Circuit Court of Appeals, affecting rights within the same jurisdiction are an evil of great magnitude and when applied to the tenure of land, would be an intolerable plague.

Navigable waters of the United States,are t hose which are presently used or maybe in the future for purposes of interstate or f-oreign commerce." It is not every small c-reek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, to give it the character of a navigable stream, it mus t be generally and commonally used to some purpose of trade or agriculture."The Monel-lo. 20 Wall,430 (GEORGIA CODE ANN.85-1303

The petitioner respectfully contends that Richardson Creek is not a navigable waters of the United States (1) Testimony of the principal witness,,was that,,he was at the cite in question, One Time (R.Vol 11 App.11 7)and testified that mostly small craft and pleasure boats,that was all the testimony of the government witness,and that due to the bridges along the creek they could not get through,two bridges,permently fixed and fu-ll of snags, (R.Vol.11 App.122) There has been no judicial determination that Richar-dson Creek is used for purposes of Commer-ce and the Corps of Engineers is without authority to require or deny the issuing of permits "the Courts statement (which I credit) para. 5 (R.Vol 11App.46) That Rich-ardson Creek is navigable is based on erron eous conclusions of law and interpretation of facts, and the findings of fact is in co ntradiction of the Judgment issued.(App.3a. The trial court in making its own judicial determination must look to the law,The rule as to navigablillity has been and still is waters used for the purpose of interstate o r foreign commerce."The Government failed to carry the burden of proof as to the na-vigabillity of Richardson Creek,the subje-ct of this action..and that the marshlands

adjoining such streams are the sole propert y of the petitioner and a Riparian proprietor,whose land is bounded by a navigable river, has the rights of access to the navigable part of the river and the right to m ake a landing,wharf or pier for his own use or the use of the public.This riparian ri parian right is property, and is valuable - and the owner can be deprived of it only if necessary that it be taken for the public good,upon due compensation.(Yates v.Milwaukee 77 U.S S.Ct. 10 Wall.497-507) Illinois Central Railroad Co. v.Illinois 146 U.S.436. 13 S.Ct. 110. 36 L.Ed.1018) Philadelphia v.Simpson 223 U.S. 570,. 56 L. Ed. According to the State of Georgia the Riparian rights extend to the low water mark and that is accepted law by this court,.and that no Federal question could be involved therein.(Kenyon v.Knipe,46Fed. 313) App.7a Georgia Code Ann. 85-1309.

Marshlands and similar areas are "navigable in law " but only so far as the area is subject to inundation by the mean high tides" Federal Register Vol. 37. NO. 176 18289 it becomes effective on the date of publication (9/9/72.

From the above the court may conclude three things: First, it is interpretative to the general rule and an assumtion of authority not duly authorized specifically by Congress, Secondly it was published without notice and while everyone is presumed to know the law, it is a rebuttle,presumption and publication without notice would certainly carry no presumption as against the general public,Thirdly,this rule only became effective on September 9,1972.It was not in existance in 1965 when work was begun on Petitioners property,Hence as to the present case IT IS EX POST FACTO. and in direct violati-

on of the Constitution of the United States

The name creek implies, that this is a small body of water and limited in size and distance as show in the DX Vol 1. 345, 8/29 73.

Marshlands are not used for purposes of Nav gation and the lower and trial courts are using the Environmental acts of the Federal government to find petitioner in violation of 33 U.S.C.403, in Stoeco Homes Inc. v.United States 498 F. 2d. 597(1974) found that "Federal Environmental laws do not apply to state or private activities." This is in di rect conflict with the decision of United States v. Moretti 478 F.2d.418.

The trial court"abused its discretion" in finding petitioner in violation of 33 U.S. C.403, The petitioner having to release his attorney due to trial costs far beyon- d his means had to represent himself and found himself at a disadvantage, . . . the trial court ignored the testimony and the witnesses of the petitioner and the illeg- al manner in which this complaint was fil- ed, and it is the petitioners contention th- at the Judgment of the trial court is based on erroneous conclusions of law and interpr etation of facts.

ARGUMENT

THE FIFTH CIRCUIT COURT OF APPEALS HAS DEC_ IDED A FEDERAL QUESTION IN A WAY IN CONFLIC T WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN THAT MARSH L_ ANDS ARE PART OF THE NAVIGABLE WATERS OF TH E UNITED STATES UP TO THE MEAN HIGH TIDES, THIS DECISION IS INCONSISTENT WITH THE SUP- REME COURTS DECISION IN ILLINOIS CENTRAL R- AILROAD COMPANY V. ILLINOIS, 146 U.S.436.

AND VIOLATES THE SOVEREIGN RIGHTS OF THE ST ATE OF GEORGIA,AND THE CITIZENS THEREIN.

On the Georgia coast flood tide covers a vast area of land,500,000 acres or more, which at low tide is exposed to view,for co nvenience, the term marshlands is used., Here if a water course is navigable, it is so because the dept an width of it are sufficient to float useful commerce.If the depth and with is augmented by a periodical increase of water called"tide," that fact may make the stream navigable at those points in it where it is so in fact,to wit,in its channel,but not navigable where it is n ot so in fact,to wit, out of the channel in the marshes.
Georgia laws and the State ConstitutionApp. 7a states that Riparian rights extend to th e low water mark (app.8a. and these Jurisdictional rights can not be violated by any laws of congress or any Federal Agency, The boundries and jurisdiction of the state of Georgia and a special agreement between the state and congressin April 24,1802 when Articles of Agreement and Cession, 7 th. Congress No.69. 1 st.Session Art.11 ceded to the State of Georgia all rights of jurisdiction over the lands within the boundries described. App.13a. and 14a further proof of such agreement is the following Act of the State Legislature to cede the following marshes to the United States for opening on inland waterways,(app.8,9a) and the 1953 Submerged Land Act, 43 U.S.C. 1311 (a)(1)(2) Rights of the States(app.9a)

The Complaint and jugement of the trial court violates these Constitutional Rights of Art. 10 and Art. 5 of due process of Petitioner,Under Riparian rights,an owner is

entitled among other rights(as held in Yates v. Milwaukee, 10 Wall. 497) to access to navigable waters on the front of which lies his land and for that purpose to make a landing, wharf or pier for his own use. Illinois Central Railroad Co. v.Illinois,146 U.S. 436 . The United States Supreme Court has ruled many times on this very right and it is an accepted fact.

Therefore the Regulations for permits by the Secretary of the Army under (33 U.S. C.-1)(App.6a.) are in violation of Art. 5 of due process.

The Corps of Engineers have no jurisdiction over marshlands where no navigability exists in fact. Marshlands within the Petitioners boundries belongs absolutely to the petitioner, Illinois Central Railroad Co. v.People of the state of Illinois,146 U.S. 436;

No testimony or evidence was submitted to to establish Richardson Creek as Waters of the United States,further more two permently fixed bridges and and the physical discription of the waterways in DX,3,4,5 R.Vol 1 8/29/73. and a photo of Petitioner standing in the middle of the creek on sandy mud bottom, (app.Vol 11. 297) (app.vol.11 234 impeaches the witnesses testimony. (DeBordeleben Marine Corp. v.United States 5 cir. 451 F.2d. 140 (1971) "what is for marineers to rely on may safely be used by Judges)

In Moretti v. United States 478 F.2d. 418 the Ecology laws effected the violations of the Rivers and Harbors Act of 1899,

In United States v. Stoeco Homes Inc. 498 F.2d.597 (1974) that the Ecology laws do not effect state or private activity.

The extent that the Federal jurisdiction extends into the waters of the United State s are resolved by state laws was reconized Shively v.Bowlby,152 U.S. 34,43, 38 L.344 347, 14 S.Ct.560,564, Kenyon v.Knipe, 46 Fed.313,

(In United States v. Bigan, 170 F. Supp 219, No.9) In order to justify abatement o f bar in river constituting a nuisance in fact, it would have to be found to have cau sed or likely to cause, an actual material substantial and serious obstruction or impediment to navigation and not merely a fanc iful,trivial,technical or inconsequential one,and danger would have to be imminent a-nd of pressing necessity, and mere possibility or fear of ,future injury to navigatio n from obstruction would not be ground for mandatory injunction.

It is respectfully submitted that the Writ of Certioari should issue.

Herman Diamond

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Savannah Georgia.
31410

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff

State of Georgia, Plaintiff-Intervenor

v.

Herman Diamond, Defendant

O R D E R

The United States brought this action for preliminary and permanent injunction against Herman Diamond, pursuant to 33 U.S.C. SS 403 and 407, in connection with an allegedly unauthorized fill of marshland in Chatham County, Georgia. The State of Georgia intervened in the action on April 7, 1973, and sought a permanent injunction against further filling or altering the coastal marshlands of the State. Both the United States and the State of Georgia seek mandatory relief in the way of removal of the fill material placed by defendant in the marsh area involved.

On April 5, 1973, this Court issued a Temporary Restraining Order in connection with the depositing or dumping by defendant of refuse of any kind in the marshlands

along Richardson Creek. This Order expired after ten days but has been kept in effect by oral direction of the Court at at least two of the several evidentiary hearings in the case. My notes and the records of the Court reflect that such hearings were held during 1973 on May 28th, August 10th, August 29th-30th, September 4th and November 8th.

On June 14, 1973, defendant filed with the Corps of Engineers an application for an After-the-Fact Permit in regard to the fill. The application has been pending since that time and until a recent date. Mr. Diamond who appears as his own counsel has on at least two occasions urged that this Court is not empowered to grant mandatory injunctive relief in view of the fact that the administrative remedies in connection with his After-the-Fact Permit had not been acted upon by the Corps of Engineers. See United States v. Moretti, 478 F.2d 418, 430 (5th Cir.).[1]

On two occasions I urged the Corps of Engineers to expedite the handling of the permit in question.

Acting on matters affecting environment, ecology and wildlife is a time-consuming

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[1] In Mr. Diamond's brief on November 19, 1973, he pointed out that he had filed an After-the-Fact Permit and that an official of the Corps of Engineers "has tried in every way to delay this permit".

process and involves consideration by numerous Government and state agencies. See 33 C.F.R. S 209.120(7) (d).[2]

On March 26, 1974, the Department of the Army found that the issuance of an After-the-Fact Permit to Mr. Diamond "for the proposed and existing fill will not be in the public interest, and therefore, the permit is hereby denied".

JUDGEMENT

April 17, 1974

This cause came on to be heard on the complaint of the United States of America, plaintiff, and the Court having heard oral evidence and admitted exhibits in open court and the Court having entered its findings of fact and conclusions of law on April 17, 1974, and it further appearing to the court that the defendant is committing acts and is about to commit acts as set forth in plaintiff's complaint, and will continue to do so unless restrained by order of this court, and that the said acts have caused irreparable injury and damage to the marshlands described in the complaint and that immediate and irreparable injury, loss or damage to the described area will result and that the activities described in the complaint have been con-

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[2] Under the Environmental Policy Act the Army "must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors". Zabel v.Tabb, 430 F.2d 199, 213(5th Cir.);33 CFR S 209.120(f).

ducted by Herman Diamond without a permit from the Secretary of Army as required by 33 U.S.C. Section 403 and are in direct violation of the laws of the United States.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns, and each of them, be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations on the area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

No. 74-2273

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

April 24, 1975

OPINION

The United States and others instituted action to enjoin landowner from engaging in or permitting any fill or construction operations on certain salt water tidal marshlands. The United States District Court for the Southern District of Georgia, Alexander A. Lawrence, Chief Judge, granted the injunction and the landowner appealed. The Court of Appeals, Thornberry, Circuit Judge, held that request by Secretary of Army or his designate was not required to authorize institution of the suit; that grant of dock permit to landowner did not authorize landowner to engage in filling operations; that evidence sustained determination that creek which adjoined owner's land was navigable;

and that district court did not err in accepting testimony of government witness and in determining that the area filled would have been inundated at mean high water had it not been filled.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-2273

ON PETITION FOR REHEARING

(Filed May 29, 1975)

Before Bell, Thornberry and Gee, Circuit Judges.

PER CURIAM:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

RIVERS & HARBORS ACT OF 1899

Title 33 U.S.C. Sec. 403

OBSTRUCTION OF NAVIGABLE WATERS GENERALLY; WHARVES; PIERS, ETC.; EXCAVATIONS AND FILLING IN.

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir,

breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. (Mar.3, 1899, ch.425, S. 10,30 Stat.1151.)

GENERAL PROVISIONS

Title 33 U.S.C. Sec. 1

REGULATIONS BY SECRETARY OF THE ARMY FOR NAVIGATION OF WATERS GENERALLY.

It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated by law to some other executive department. Such regulations shall be posted, in conspicuous and appropriate places, for the information of the public.

LAWS OF THE STATE OF GEORGIA

CHAPTER 85-13. WATER RIGHTS, NAVIGABLE STREAMS, ETC.

85-1308. (3636) Navigable tidewater defined.--A navigable tidewater is any tidewater, the sea, or any inlet thereof, or other bed of water where the tide regularly ebbs and flows, which is in fact used for the purposes of navigation, or is capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade. The mere rafting of timber thereon, or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within the meaning of this and the preceding section, and shall not make tidewater navigable. (Acts 1902, p. 108)

85-1309. (3637) Rights of owners of land adjacent-to navigable tidewaters.--For all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tidewaters, as defined in the preceding section, shall extend to low water mark in the bed of the water. Provided, however, that nothing in this and the two preceding sections shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or nonnavigable, by any person whomsoever, as to prevent the free use of the same by others, for purposes of passage and for the transportation of such freights as may be capable of being carried thereover. (Acts 1902, p. 108)

85-1310. (3638) Levees and ditches; construction authorized.--All persons owning, or who may hereafter own, lands on any watercourses are authorized and empowered to ditch and embank their lands, so as to protect the same from freshets and overflows in said watercourses: Provided always, that the said ditching and embanking does not divert said watercourse from its ordinary channel;

GEORGIA STATE CONSTITUTION OF 1945

Art. 1, Sec. 6, Par. 1

Tidewater titles: confirmed. The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed.

UNITED STATES, CEDING MARSH LANDS TO.

No. 325.

An Act to grant and cede to the United States Government certain strips of marsh land in Camden county, Georgia, for the purpose of further opening on inland waterway, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same that the Governor of the said State be, and is, hereby authorized and directed to grant unto the United States of America sufficient tracts of marsh land located in Camden County, Georgia, and in 33d District G.M. of said county, of a width in each instance not to exceed six hundred (600) feet and of a length

necessary to connect Little Satilla River with Unbrella Creek and Dover Creek with Bailey's Cut and of such shapes and bounds, courses and distances, and containing such acreage as may be prescribed by the United States engineer officer at Savannah, Georgia, for the purpose of connecting the said waterways by such canals for navigation, and upon certificate filed by the United States engineer officer in charge of the office at Savannah, Georgia, with the said Governor, the Governor shall then issue a grant or grants covering the said tracts of land, and which may be issued in one grant or two grants as may be feasible, and upon the issuance of said grants the jurisdiction of the United States Government is hereby ceded by the State of Georgia over the lands hereby stated.

Sec. 2. Be it further enacted that all laws and parts of laws in conflict with this Act are hereby repealed.

Approved July 29th, 1914.

TITLE 43, U.S.C.
Statue 1311. Rights of the States

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950 entitled thereto under the law.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff

v.

Herman Diamond, Defendant

C O M P L A I N T

NOW COMES the plaintiff, United States of America, by and through its undersigned counsel, and complaining of the defendant, HERMAN DIAMOND, alleges and says as follows:

1. This Honorable Court has jurisdiction over this cause of action by virtue of the fact that the United States of America is the plaintiff herein (Title 28, United States Code, Section 1345).

2. The defendant is an individual residing and living within the Southern District of Georgia.

3. On April 4, 1973, and at times unknown to the plaintiff, and prior thereto, and continuing through until the present time, the defendant and others acting as agents of said defendant jointly and severally undertook the fill of estuarine marshlands within the navigable waters of the United States in a marsh adjacent to Richardson Creek, Oatland Island, Chatham

County, Georgia; and thereby threw, discharged, deposited, caused to be deposited, procured to be thrown, and suffered to be deposited from the shore, within the navigable waters of the United States, refuse, which includes but is not limited to the following: roots or stumps, broken concrete, construction materials, and dirt, in violation of the provisions of Title 33, United States Code, Section 407; and further, the defendant has created an obstruction to navigation within the navigable waters of the United States, to wit: the estuarine marshlands adjacent to Richardson Creek, Oatland Island, the said obstruction not being affirmatively authorized by Congress and, therefore, prohibited by and in violation of Title 33, United States Code, Section 403.

4. No Department of the Army permit for dumping of fill within the navigable waters of Richardson Creek, Oatland Island, has been issued to the defendant. Defendant has not applied for said permit.

5. Upon information and belief, it is alleged that the defendant has not ceased the said depositing of refuse within the navigable waters of the United States.

6. The said refuse now lying within the estuarine marshlands of the United States is and represents an irreparable damage and harm to the plaintiff and to the people of the United States.

7. The said deposit of refuse within the navigable waters of the United States, if allowed to remain, will further impair and destroy the navigable waters of Richardson Creek, Oatland Island.

8. Unless defendant, HERMAN DIAMOND, and his agents are restrained from further depositing of refuse within the navigable waters of the United States, the same will continue in their efforts to complete the unauthorized land fill operation.

WHEREFORE, the plaintiff prays to the Court:

1. That a permanent Injunction issue to restrain and enjoin the defendant from further depositing or dumping of refuse of any kind within the navigable waters of the United States, particularly in the marshlands of Richardson Creek, Oatland Island, Chatham County, Georgia, the said dumping or depositing of refuse being in direct violation of the laws of the United States; and

2. That an Order issue mandatorily compelling the defendant to remove the said refuse heretofore deposited within the navigable waters of the United States in said area; or

3. In the alternative, that the Court award damages to the plaintiff, both compensatory and punitive, along with the costs of this action, and such other and further relief as the Court may deem just, reasonable, and proper.

TITLE 15

BOUNDARIES AND JURISDICTION OF THE STATE OF GEORGIA

15-101. (16) Boundaries of the State.--The boundaries of Georgia as deduced from the Constitution of Georgia, the Convention of Beaufort, the Articles of Cession and Agreement with the United States of America entered into on the 24th of April, 1802, the Resolution of General Assembly of December 8, 1826, and the adjudications and compromises affecting Alabama and Florida, are as follows:

GEORGIA CESSION

COMMUNICATED TO CONGRESS, APRIL 26, 1802

7th Congress No. 69. 1st Session

ART. II. The United States accept the cession above mentioned, and on the conditions therein expressed: and they cede to the State of Georgia whatever claim, right, or title, they may have to the jurisdiction, or soil of any lands lying within the United States and out of the proper boundaries of any other State, and situated south of the southern boundaries of the States of Tennessee, North Carolina, and South Carolina, and east of the boundary line hereinabove described, as the eastern boundary of the territory ceded by Georgia to the United States.

CHAPTER 15-2. JURISDICTION OF THE STATE.

15-201. Extent of sovereignty and jurisdiction.--The sovereignty and jurisdiction

of this State extend to all places within the limits of herboundaries, except so far as she has voluntarily ceded the same to the United States or adjacent States over particular localities.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. 3092

United States of America, Plaintiff
et, al.

v.

Herman Diamond, Defendant

N O T I C E

TAKE NOTICE that there was entered on the Docket June 9, 1975 an (order) in the above styled case making the judgment of the Fifth Circuit the judgment of this court.

COURT, U. S.

Supreme Court, U. S.
FILED
SEP 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-287

HERMAN DIAMOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
STATE OF GEORGIA,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Respondent, State of Georgia, Plaintiff-Intervenor in the United States District Court and Appellee in the Court of Appeals for the Fifth Circuit, respectfully urges denial of the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 512 F.2d 157 (5th Cir. 1975) and is attached hereto as Appendix A. The opinion of the United States District Court for the

Southern District of Georgia (Savannah Division) is not reported, and a copy of the opinion is attached hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the decision of the lower court permanently enjoining petitioner from filling a tidal marsh within the navigable waters of the United States without the requisite permit from the United States Army Corps of Engineers.

STATUTE INVOLVED

33 U.S.C. § 403 (The Rivers and Harbors Act of 1899, Section 10):

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or

of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

STATEMENT OF THE CASE

The United States filed this action seeking a preliminary and permanent injunction against further filling of tidal marshlands by petitioner in violation of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. Jurisdiction is founded on 28 U.S.C. § 1345. Pursuant to an order of the District Court, the State intervened as a plaintiff and joined the United States in seeking a permanent injunction against further filling or altering of tidal marshlands. (App. B, p. 1b).

This case involves a small parcel of tidal marsh along Richardson Creek in Chatham County, Georgia. (App. B, p. 3b). Petitioner claims ownership of the marsh by virtue of a 1965 deed to the area. (App. B, p. 3b). Richardson Creek forms part of the dendritic web of creeks and rivers that traverse and sustain the marshes of coastal Georgia. (App. B, p. 3b). Richardson Creek flows into the Wilmington River, one of the major tidal rivers of Chatham County, which forms part of the Intracoastal Waterway. (App. B, p. 3b).

In 1964 the area in question consisted entirely of marshland, which would today be below the level of mean high water had it not been filled. (App. B, p. 4b). In 1965 petitioner applied for and obtained a permit to build a forty-foot walkway and dock extending into Richardson Creek. (App. B, p. 11b). This permit neither contained nor implied any authorization

for a bulkhead or fill. (App. B, p. 12b).

From about 1965 until the time that this action was filed, petitioner proceeded to fill the area in order to have enough high ground to obtain a county building permit. (App. B, p. 7b). The United States Army Corps of Engineers first became aware of petitioner's unauthorized filling of the marsh in June, 1972. Shortly thereafter, the Corps of Engineers by letter requested petitioner to cease filling in the marsh. (App. B, p. 6b). Later in the summer of 1972 petitioner was again advised by the federal authorities and by the state authorities that a permit was required for filling in tidal marshes. (App. B, p. 6b). In April, 1973, state and federal officials visited the site and witnessed petitioner engaged in filling activities. (App. B, p. 7b). This action was filed the following day.

After six days of testimony, the United States District Court on April 17, 1974, entered an order permanently enjoining petitioner from any further filling in navigable waters of the United States. (App. B). The Court of Appeals for the Fifth Circuit affirmed this judgment on April 24, 1975. (App. A).

ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit is based on well-settled principles of federal law and presents no question on which the courts of appeals are in disagreement.

The thrust of petitioner's argument is that he owns the marsh area in question and that therefore he is entitled to fill that marsh without having to obtain a permit from the United States Army Corps of Engineers. Petitioner concedes that regulations adopted by

the Corps of Engineers require such a permit, but he contends that the regulations violate his "riparian rights" and his right to due process of law.

Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) makes it unlawful to fill, alter or modify the course, condition or capacity of any navigable water of the United States without a permit from the Corps of Engineers. The regulations of the Corps of Engineers provide that tidal marshlands, up to the mean high water mark, are navigable waters of the United States and come within the terms of 33 U.S.C. § 403. 33 C.F.R. § 209.260(k)(2).

While this Court has never addressed the question, it is clear that the navigable waters of the United States extend to the shoreward limit, or mean high water mark, of tidelands, including tidal marshes. *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (4th Cir. 1974), *cert. denied*, _____U.S._____ (1975); *United States v. Joseph G. Moretti, Inc.*, 478 F.2d 418 (5th Cir. 1973); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Within the navigable waters of the United States the federal navigational servitude is paramount to riparian and other proprietary rights. 43 U.S. C. § 1314; *United States v. Stoeco Homes, Inc., supra.; see, e.g., South Carolina v. Georgia*, 93 U.S. 4, 23 L.Ed. 782 (1876); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 724, 18 L.Ed. 96 (1865).

Petitioner cites the case of *Illinois Central R. R. v. Illinois*, 146 U.S. 387, 36 L.Ed. 1018, 13 S.Ct. 110 (1892) for the proposition that "[M]arshlands within the Petitioner's boundaries belong absolutely to the Petitioner." (Petition for a Writ of Certiorari, p. 2). In fact, however, that case recognizes that the ownership

of and sovereignty over lands covered by tidewaters is "subject always to the paramount right of Congress to control their navigation. . . ." 146 U.S. at 435, 36 L.Ed. at 1036. Congress can require, and has through the Rivers and Harbors Act required, that a permit be obtained prior to modification of the capacity of any navigable water of the United States.

Petitioner also contends that Richardson Creek, adjacent to the area in question, is not navigable, and that the area in question is not below mean high water. However, the District Court found that Richardson Creek is navigable in fact and that the area would have been inundated at mean high water had it not been filled. (App. B, pp. 4, 7b). The Fifth Circuit decision held that these findings were not clearly erroneous. (App. A, pp. 4-5a). These issues are not of sufficient importance to warrant the issuance of a writ of certiorari.

CONCLUSION

For the above reasons, the State of Georgia urges this Court to deny the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES of America et al.,

Plaintiffs-Appellees,

v.

Herman DIAMOND,

Defendant-Appellant.

No. 74-2273.

United States Court of Appeals,

Fifth Circuit.

April 24, 1975.

* * *

Appeal from the United States District Court for the Southern District of Georgia.

Before BELL, THORNBERRY and GEE, Circuit Judges:

THORNBERRY, Circuit Judge:

This is an appeal from the district court's granting of a permanent injunction forbidding appellant Diamond "from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations" on certain salt water tidal marshlands owned by Diamond. Appellant argues that the injunction must be vacated on four separate grounds: (1) the Secretary of the Army or his designate did not request the bringing of this suit, as required by statute;(2) the District Engineer's granting of a dock permit to appellant in 1965 established a harbor line, and filling shoreward of this line is expressly permitted if begun—as appellant's operations were—before 1970; (3) the marsh in question is not part of a navigable waterway and thus falls outside the jurisdiction of the Corps of Engineers;

and (4) appellant's property is above the mean high tide line, and the Corps of Engineers has no authority landward of this line. Finding no error in the findings and conclusions of the district court, we affirm.

[1, 2] (1) 33 U.S.C. § 413 makes it the "duty of United States attorneys to vigorougly prosecute all offenders against . . . [sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title] *whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated* . . ." (emphasis added). The government brought suit against Mr. Diamond pursuant to 33 U.S.C. §§ 403 and 407. Appellant argues that no person authorized by § 413 requested proceedings against him. It is clear, however, that the United States Attorney's duty to prevent violations of the law justifies his taking action against illegal fill operations regardless of who brings the violation to his attention. United States v. Interlake Steel Corp., N.D.Ill.1969, 297 F.Supp. 912. *See also* United States v. Rohm & Haas, 5 Cir. 1974, 500 F.2d 167, 174; Connecticut Action Now, Inc. v. Roberts Plating Co., 2 Cir. 1972, 457 F.2d 81, 87, & n. 11.

[3] (2) In 1965 appellant sought and obtained a permit to build a walkway and dock on his property. Up until 1970, riparian owners with open pile structures (docks) could fill shoreward from the dock without a permit, as long as their dock marked the boundary of a designated harbor line. In 1970 the applicable regulation was amended to require a permit for this type of filling, but the new regulation specifically exempted fill operations begun prior to its effective date. 33 C.F.R. § 209.150. Appellant contends that the District Engineer's approval of his dock in 1965 constituted a *de facto* designation of a harbor line. Hence, he argues, because he

began his fill operations before 1970, he needs no permit.

The government responds that the Regulations provide a specific procedure for designating harbor lines, and no such lines have ever been established around Diamond's property. Intervenor, State of Georgia, also contends that Diamond is not a riparian owner. The district judge found that "[t]he grant of the permit in 1965 as to the dock facility did not constitute establishment of any harbor line" (App. at 53) and cited United States v. Stoeco Homes, Inc., D.N.J.1973, 359 F.Supp. 672. We note that the relevant portion of the district court opinion in *Stoeco Homes* was disapproved on appeal. United States v. Stoeco Homes, 3 Cir. 1974, 498 F.2d 597, 602-04. The Third Circuit stated in dicta that 33 C.F.R. § 209.150, which as noted permits continuance of fill operations directed shoreward of existing harbor lines and begun prior to the effective date of the new Regulation, "appears to refer to actual harbor lines established by any authority." 498 F.2d at 604. The court also noted that the district court failed to mention the new regulation and that the evidence tended to show the government had in fact designated harbor lines in the area involved in that case.

In the case before us the district judge considered the effect of 33 C.F.R. § 209.150(b)(2). He held that the evidence showed that harbor lines are designated only in accordance with formal procedures and that no harbor lines have been established in the area of Diamond's property. These conclusions have not been shown to be incorrect. We see nothing in § 209.150 suggesting that the Regulation is concerned with any harbor lines but those established in accordance with the procedure set out in § 209.150(c) and its predecessors. Thus, appellant gained no right to fill the marsh by

obtaining the dock permit.

[4, 5] (3) Appellant also contends that Richardson Creek, the body of water adjoining his land, is not navigable and thus that the Corps of Engineers has no jurisdiction over it. The district court found as a fact that "Richardson Creek is navigable within the meaning of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 403, 407) and the Regulations promulgated pursuant thereto" (App. at 46). Appellant's main argument here is that Richardson Creek is not navigable because it has no interstate or foreign commerce and is not always navigable in fact. These two tests, however, are not necessarily controlling on legal navigability. *See* United States v. Holland, M.D.Fla.1974, 373 F.Supp. 665, 668-70; United States v. Lewis, S.D.Ga.1973, 355 F.Supp. 1132, 1136-39; United States v. Underwood, M.D.Fla.1972, 344 F.Supp. 486, 489-93; *cf.* United States v. Stoeco Homes, Inc., *supra*, 498 F.2d at 610 ("In tidal waters the test, in our view, remains what it was before 1851, the ebb and flow of the tide"). *But see* United States v. American Cyanamid Co., S.D.N.Y. 1973, 354 F.Supp. 1202, 1204-05, aff'd 2 Cir. 1973, 480 F.2d 1132. The district court credited testimony tending to show that Richardson Creek is navigable in fact. Because this finding is not clearly erroneous, Fed.R. Civ.P. 52(a), further inquiry by this court into navigability is precluded.

[6] (4) "[T]he Corps has no power landward of . . . [the mean high tide line] to regulate . . . [the landowner's] conduct or force reconstruction of the topography as it existed before he began work." United States v. Joseph G. Moretti, Inc., 5 Cir. 1973, 478 F.2d 418, 428-29; *cf.* United States v. Holland, *supra*, at 670 of 373 F.2d; United States v. Lewis, *supra*, at 1136-37, 1139-40 of

355 F.Supp. Appellant here claims that the district judge clearly erred in accepting testimony by one government witness and finding as a fact that "the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled" (App. at 49). This contention challenges a factual determination by the trial court that can be overturned only for the plainest sort of error. Fed.R.Civ.P. 52(a). No such error appears here.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, STATE OF GEORGIA, *Plaintiff-Intervenor*, VS. HERMAN DIAMOND, *Defendant.*	CIVIL ACTION NO. 3092

FINDINGS OF FACT AND CONCLUSIONS OF LAW JUDGMENT AND ORDER

The United States brought this action for preliminary and permanent injunction against Herman Diamond, pursuant to 33 U.S.C. §§ 403 and 407, in connection with an allegedly unauthorized fill of marshland in Chatham County, Georgia. The State of Georgia intervened in the action on April 7, 1973, and sought a permanent injunction against further filling or altering the coastal marshlands of the State. Both the United States and the State of Georgia seek mandatory relief in the way of removal of the fill material placed by defendant in the marsh area involved.

On April 5, 1973, this Court issued a Temporary Restraining Order in connection with the depositing or dumping by defendant of refuse of any kind in the marshlands along Richardson Creek. This Order ex-

pired after ten days but has been kept in effect by oral direction of the Court at at least two of the several evidentiary hearings in the case. My notes and the records of the Court reflect that such hearings were held during 1973 on May 28th, August 10th, August 29th-30th, September 4th and November 8th.

On June 14, 1973, defendant filed with the Corps of Engineers an application for an After-the-Fact Permit in regard to the fill. The application has been pending since that time and until a recent date. Mr. Diamond who appears as his own counsel has on at least two occasions urged that this Court is not empowered to grant mandatory injunctive relief in view of the fact that the administrative remedies in connection with his After-the-Fact Permit had not been acted upon by the Corps of Engineers. See *United States v. Moretti*, 478 F.2d 418, 430 (5th Cir.).[1]

On two occasions I urged the Corps of Engineers to expedite the handling of the permit in question.

Acting on matters affecting environment, ecology and wildlife is a time-consuming process and involves consideration by numerous Government and state agencies. See 33 C.F.R. § 209.120(7)(d).[2]

On March 26, 1974, the Department of the Army found that the issuance of an After-the-Fact Permit to Mr. Diamond "for the proposed and existing fill will

[1] In Mr. Diamond's brief on November 19, 1973, he pointed out that he had filed an After-the-Fact Permit and that an official of the Corps of Engineers "has tried in every way to delay this permit".

[2] Under the Environmental Policy Act the Army "must consult with, consider and receive, and then evaluate the recommendations of all of these other agencies articulately on all these environmental factors". *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir.); 33 CFR § 209.120(f).

not be in the public interest, and therefore, the permit is hereby denied".

Findings of Fact

1. In 1965 Charles Wood, Sr. and Herman Diamond acquired certain marshland bounded on the north by Richardson Creek and on the south by Oatland Island Road. The fill is located on a portion of the land described in this deed.

2. In 1969 Mr. Wood conveyed his one-half interest in a 100-foot strip of the marsh to the defendant. In 1972 Mr. Diamond obtained a deed from Wood conveying the latter's one-half interest in a fifty-foot strip of marshland adjoining the 100-foot parcel above described and located immediately to the east thereof.

3. Richardson Creek forms part of the web of creeks and rivers that traverse the marshes of Chatham County and coastal Georgia. Richardson Creek makes off of the Wilmington River near Causton's Bluff. The Wilmington is one of the major tidal rivers of Chatham County and comprises several miles of the Intracoastal Waterway. From their confluence Richardson Creek flows through the salt marshes in a generally easterly direction and eventually goes into Turners Creek. In turn, the latter empties into the Wilmington River at a point approximately 8 or 10 miles from its mouth at the head of Warsaw Sound. The Sound borders the Atlantic Ocean.

4. Along Richardson Creek are located houses and numerous privately-owned docks. Mr. Diamond himself owns a floating dock in Richardson Creek at the end of the marshfill. The creek is navigable at that point for cabin cruisers as long as 45′ in length.

5. There was testimony (which I credit) that Richardson Creek is navigable throughout its extent at low tide and that it has a maximum depth at mean low water of 4.8′ in the area involved. The mean depth is 2½′ to 3′ at mean low tide.

6. At mean high water all of the marsh lying to the eastward of the Diamond fill is inundated.

7. In 1932 the Corps of Engineers classed Richardson Creek as a tributary of Wassaw Sound and as being navigable throughout. See "Report on navigability of Streams Entering the Atlantic Ocean Between Tybee Creek and Wassaw Sound, Inclusive". The Report classifies Richardson Creek as "Unquestionably Navigable: In Present Commercial Use by Boats of 6-Foot Draft or Over" and that it is navigable for its full length of 5.9 miles.

8. Richardson Creek is navigable within the meaning of the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 403, 407) and the Regulations promulgated pursuant thereto.

9. Government's Exhibit No. 6 is a 1964 aerial photograph which includes the coastal area concerned in this litigation. It demonstrates that at that time the fill area constituted marshland. The photograph also shows a very small creek or rivulet running from Richardson Creek southward through what is now the filled area of the marsh. A 1973 survey (Government's Exhibit No. 1, August 29, 1973) reveals traces of the rivulet at its mouth on Richardson Creek.

10. In June, 1968, Mr. Diamond obtained from the authorities of Chatham County a Permit for a "rubbish land fill". See Defendent's Exhibit No. 2, May 28, 1973. An inspection report attached to the application there-

for revealed that in January, 1970, the fill "is just about completed" and that it was "just a question of more dirt". Government's Exhibit No. 1, August 10, 1973.

11. Mr. Diamond testified that the purpose of the fill in question was to erect a house and that he could not obtain a County building permit for building same without additional highland.[3] Transcript, May 28, 1973, 101.

12. At the hearing on September 4, 1973, M. C. Anderson who is engaged in the land-clearing business testified that he had placed numerous truckloads of fill in the marsh at Mr. Diamond's request. He began the marshfill in 1966 and his activities continued through 1969. The fill was described by Anderson as consisting of roots, stumps, logs, leaves, dirt and debris. Transcript, September 4, 1973, 9-11.

13. Mr. Diamond testified that he did not in fact give Mr. Anderson permission to dump on the land in question. Transcript, May 28, 1973, 99-100. He stated that "all these landscape clearing gentlemen—there were a dozen of them—they had no place to dump their fill, and they dump it anywhere that their trucks could find a hole. It was very convenient for them to come off of East Pine, which was building very rapidly . . . We weren't there and couldn't watch it but when we come there a month or six weeks later, and see this fill and call the police on several occasions." Mr.

[3] ". . . the County required twenty thousand square feet. We didn't quite have twenty thousand square feet of high ground, we only had about fourteen thousand. So, I asked Mr. Blitch if we could, and he said they have no provisions to issue any permit for that type of fill. That we were well out of range of any channel in the river or the low water mark."

Diamond denied that anyone ever had his permission to place material in the area in question. Transcript, May 28, 1973, 102-103.

14. Mr. Diamond's fill first came to the attention of the Corps of Engineers in June, 1972, when Government representatives made a routine inspection of unauthorized dumping and filling in marsh adjacent to Richardson Creek. By letter dated June 12th the District Engineer requested Diamond to stop any further filling of the marsh and to take necessary steps to contain any and all material that may be displaced by tides, storms or floods into navigable waters or their tributaries. He was furnished copies of excerpts from Title 33, U.S.C. §§ 403, 406, 407, 409, 411 and 412.

15. Mr. Diamond responded to the District Engineer by letter dated June 16, 1972, stating that he had reviewed the material furnished to him and did not feel his property was subject to the Corps of Engineers' jurisdiction.

16. On August 29, 1972, the District Engineer advised defendant that he had reviewed the file and had determined that the property was subject to regulatory authority of the Corps of Engineers and that the fill had been placed in the marshland without any Permit. Mr. Diamond was requested either to remove the fill and restore the marshland to its original condition or file an application for a Department of the Army Permit.

17. Dr. Frederick C. Marland who is Director of Marshland Protection, Georgia Department of Natural Resources, testified that he visited the fill site on August 6, 1972, and advised Mr. Diamond that the work in progress was unauthorized. At that time, Dr.

Marland observed some activity and equipment on the fill.[4] Transcript, May 28, 1973, 43.

18. Dr. Marland again visited the site in April, 1973. He testified that he observed the defendant pushing mounds of dirt into the marsh. Transcript, 48.

19. At that time he advised Dr. Marland that he was not going to apply for a Permit. After being warned that his actions were illegal, Mr. Diamond, according to Marland, said "he was going to dump and watch him. And he did". Transcript, May 28, 1973, 48.

20. Under the evidence in this case, it is clear that Diamond had determined to fill the marshland area in question; that he obtained a County Permit to do so; planned to erect a house on the fill, and caused or knew that the marsh area in issue was being filled with stumps, debris, logs and dirt. Defendant filled the two-acre marsh area without a Permit from the Army and continued to fill after being warned that such activity was illegal.

21. The Court finds, under the evidence, that the mean high water elevation in Richardson Creek at a point in front of the Diamond fill is 7.4′ above mean low water. As stated, at mean high water all of the marsh lying to the east of the Diamond fill is inundated and the area filled in by Mr. Diamond would have been inundated at mean high water had not the same been filled. Government's Exhibit No. 1, August 29, 1973 (a topographic survey of the filled area) reflects that all elevations in the marshland to the east of the fill are below the mean high water elevation in the vicinity.

[4] Defendant's Exhibit No. 1 (August 10, 1973) shows that on April 4, 1973, he purchased six loads of dirt for $54. Mr. Diamond explained that this was due to erosion of the top area of the fill by reason of high tides. Transcript, May 28, 1973, 98-99.

22. Earl F. Titcomb, Jr. who is Chief of the Geologist Section, Corps of Engineers testified as to the nature of the substance retrieved from drillings (ordered by the Court) on the site in controversy. In one instance a hole was drilled to the extent of 17 feet and in others around 12 feet. Transcript, August 29, 1973, 26, 35. At a depth of 3 feet to 4½ feet material was found that did not appear to be indigenous to the marsh. p. 37. At a depth of 9 feet to 10½ feet "fat clay" was found which is definitely a type of material found in marsh land. At 6 feet to 7½ feet material retrieved by boring contained what could clearly be discerned as marsh grass. p. 44. In the drilling zone denominated as "C" bits of marsh grass and peat found represented, in the opinion of Mr. Titcomb, "the natural ground surface" while the material taken from Zone "B" ("black, silty sand") represented "the material brought in". p. 50. The surface of the marsh as it existed prior to the fill was established by the borings as being at an elevation starting below mean high water.

23. At the hearing on September 4, 1973, a Government witness, Mark Horton, who is a Fisheries Biologist in the Bureau of Sports Fisheries and Wildlife, Florida, testified that in June, 1973, a bait trawl was made along Richardson Creek, including the area in front of the Diamond marshfill. It produced a catch of croaker, pinfish, white shrimp, brown shrimp, hogchoaker and blue crab. Crab and shrimp eat the organic matter produced by the marsh grass. The shrimping industry in Georgia is a sizeable one yielding an annual harvest of around $6,000,000. Transcript, September 4, 1973, 44-47. Marsh grasses (spartina alterniflora) are a vital

link in the food chain of many species of marine life.[4] Marshlands are the nursery of the sea.

24. The destruction of marshland has a definite effect on marine ecology. Of course, it varies with the size of the altered area. What the statute and regulations require is that before any marshland over which the federal government has jurisdiction is filled a Permit must be obtained from the proper authorities. None was issued to Mr. Diamond. The fact that the effect on ecology or navigation might be small is not the controlling factor.[5] There was and is a deleterious effect in the instant case on both.

25. The Rivers and Harbors Act of 1899 (33 U.S.C. § 407) makes it unlawful to discharge, deposit or cause to be discharged or deposited refuse of any kind in a

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[4] "The importance of tidal marshes in the life cycle of living organisms has commended them to such characterizations as 'the most productive areas on earth' and as a 'factory' of basic animal and plant nutrients. . . . A multitude of life forms are indigenous to tidal marshes, . . ." See James M. Kramon, "Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes," *Maryland Law Review* (1973), XXXIII, 231, 235.

"A Georgia salt marsh can outperform an average wheatfield several fold in organic production. The same author says that at least two-thirds of the nation's commercial fishing resources are made up of species that 'spend part of their life cycle in estaurine areas.' Ludwik v. Tetclaff, 'The Coastal Zone-Control Over Encroachments in the Tidewaters,' Environmental Law Review (1972), 618, 619. Georgia's Spartina alterniflora marshes produce five to nine tons of plant material an acre a year. 'Can We Save our Salt Marshes,' National Geographic, Vol. 141 (June, 1972), p. 733." See *United States v. Lewis*, 355 F. Supp. 1132, note 10 (S.D., Ga.).

[5] ". . . works in wetland areas, particularly estuarine areas . . . are often carried out in an uncoordinated and haphazard manner, and the result is the piecemeal destruction of valuable wetlands, marshes, and coastal estuarine areas." House Comm. on Gov't. Operations, Increasing Protection for Our Waters, Wetlands, & Shorelines: The Corps of Engineers, H.R.Rep.No.1323, 92d Cong., 2d Sess. at 7 (1972).

navigable water. Fill was placed or caused to be placed in the marsh area in question by Mr. Diamond. Some of it has washed into Richardson Creek during high tides and heavy rains.

26. The filling in of the marsh area with logs, stumps and debris offers a potential threat to navigation in the event of storms, hurricanes or other abnormal tide or wind conditions which might carry such material into the stream.

CONCLUSIONS OF LAW

1. This Court has jurisdiction, pursuant to the provisions of 28 U.S.C. §§ 1333 and 1345 and 33 U.S.C. §§ 403, 406, 407, 411, 413.

2. For regulatory purposes the jurisdiction of the Corps of Engineers as to "navigable waters" extends "laterally to the entire water surface and bed of a navigable water body". It "includes all the land and waters below the original high water mark". In coastal areas jurisdiction extends to the line on the shore reached by the plane of the mean (average) high water. Marshlands are "navigable in law" only so far as the area is "subject to inundation by the mean high waters". 37 Federal Register, No. 176, Part 209.260. See *United States v. Lewis, supra.*

3. The fill area is within the navigable waters of the United States as defined by interpretative Regulations which have a basis in existing and current case law.

4. The defendant filled in and altered the marshland without prior approval of the Corps of Engineers and the Secretary of the Army in violation of the Rivers and Harbors Act of 1899 and in doing so has irreversibly altered the natural condition of the site and irreparably damaged the environment and ecology.

5. It is plain that under *United States v. Moretti, supra*, at 431, when an After-The-Fact Permit is sought a federal judge has no power to cut off the statutory or administrative scheme of relief and substitute his judgment for that of the Corps of Engineers and the Department of the Army made in collaboration with departments or agencies under environmental statutes. In other words, this Court has been unable since June, 1973, to order mandatory relief in the way of the removal of the fill. The Department of the Army has, as noted, refused the issuance of an After-The-Fact Permit. On March 26, 1974, the Corps of Engineers through the District Engineer, Colonel Edwin C. Keiser, informed Mr. Diamond that "all of the debris, fill material, and bulkhead are to be removed from marshland below the historic mean high water line to a level of the original marsh elevation and placed in an approved disposal area. The above is to be accomplished not later than 120 days from receipt of this letter." The Regulation provides:

> "Where after-the-fact authorization is not determined to be in the public interest, the notification of the denial of the permit will prescribe any corrective actions to be taken in connection with the work already accomplished and establish a reasonable period of time for the applicant to complete such actions. The District Engineer, after denial of the permit, will again consider whether civil or criminal action is appropriate." See 39 Federal Register § 209. 120(12)(c)(v).

6. In 1965 the Corps of Engineers issued to Mr. Diamond a Permit to construct a dock in Richardson Creek at the site described. See Government's Exhibit No. 5, May 28, 1973. The defendant contends that the issuance thereof established the "harbor line" under

the Regulations of the Corps of Engineers on that subject and that he was not required to obtain a Permit for filling in marshland between the harbor line so established in view of 33 CFR § 209.150(2). It provides:

> "Applications for permits for work in navigable waters shoreward of harbor lines shall be filed and processed in accordance with the provisions of applicable sections of this part. For work already completed or commenced in conformance with existing harbor line authority before that date, no permit is required."

The grant of the Permit in 1965 as to the dock facility did not constitute establishment of any harbor line. The testimony at the hearings showed that harbor lines are established only in designated harbors and waterways and that the Secretary of the Army has not so designated Richardson Creek. The dock permit conferred no right on defendant with respect to filling the marsh between that point to the shore or highland. In *United States v. Stoeco Homes, Inc.*, 359 F. Supp. 672, 678 (D.,N.J.) it is said:

> "Defendant argues that the Government established federal harbor lines or ratified State harbor lines and that as a result it was relieved of the requirement to obtain a permit for work done shoreward of those harbor lines. This is incorrect in fact and in law. The Federal Government has not established harbor lines in the Back Thorofare area, nor has it, otherwise, ratified or adopted whatever State harbor lines may exist in this area. The presence of federal harbor lines, however, is irrelevant to the requirement of obtaining an appropriate federal permit for work in navigable waters."

ORDER AND JUDGMENT

The recent action of the Corps in denying an After-The-Fact Permit is judicially reviewable under the Administrative Procedure Act, 5 U.S.C.A. §§ 702, 704. See *Moretti*, at 432.[6] As I view things, the enforcement of the law and regulations and the employment of appropriate sanctions to that end in this case has become an administrative function in view of the application for the Permit and the declination thereof by the Corps of Engineers. The proper procedure for this Court is to abstain from granting any mandatory injunctive relief to plaintiff in this case, leaving the defendant to pursue his administrative remedies or such judicial appeals as he may take. Meanwhile, jurisdiction will be retained and the case will remain on the docket of this Court in the event the plaintiff hereafter requests judicial enforcement of its demand as to removal of the fill within 120 days.

The action of the Corps in declining a permit does not affect the power of this Court to determine the matter of jurisdiction and to grant a permanent injunction as to further construction or filling by the defendant.

It is therefore ordered, adjudged and decreed that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns and each of them be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction operations on the

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[6] See also *Di Vosta Rentals Inc. v. Lee*, 488 F.2d 674, 680 (5th Cir.) where the proper standard of review of administrative action was held to be whether or not the Secretary's decision is arbitrary or capricious.

area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

Counsel for plaintiff may present a form of judgment and decree in conformity with this Order. Since a permanent injunction has been granted a direct appeal will in all likelihood lie if notice thereof is filed within 30 days of the filing of such judgment and decree.

This April 17th, 1974.

/s/ ALEXANDER A. LAWRENCE

CHIEF JUDGE,
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA

SAVANNAH DIVISION

UNITED STATES OF AMERICA
v.
HERMAN DIAMOND
} CIVIL NO. 3092

JUDGMENT

This cause came on to be heard on the complaint of the United States of America, plaintiff, and the Court having heard oral evidence and admitted exhibits in open court and the Court having entered its findings of fact and conclusions of law on April 17, 1974, and it further appearing to the court that the defendant is committing acts and is about to commit acts as set forth in plantiff's complaint, and will continue to do so unless restrained by order of this court, and that the said acts have caused irreparable injury and damage to the marshlands described in the complaint and that immediate and irreparable injury, loss or damage to the described area will result and that the activities described in the complaint have been conducted by Herman Diamond without a permit from the Secretary of Army as required by 33 U.S.C. Section 403 and are in direct violation of the laws of the United States.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Herman Diamond, his servants, agents, employees, attorneys, successors, and assigns, and each of them, be permanently enjoined and restrained from engaging in or permitting, suffering, or causing, directly or indirectly, any fill or construction

operations on the area in dispute, bounded on the north by Richardson Creek and on the south by Oatland Island Road, Chatham County, Georgia.

This 17th day of April, 1974.

/s/ ALEXANDER A. LAWRENCE

CHIEF JUDGE,
UNITED STATES DISTRICT COURT

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-287

HERMAN DIAMOND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States brought this action to enjoin petitioner from further filling estaurine marshlands within the navigable waters of the United States, in violation of Section 10 [1] of the Rivers and Harbors Act of 1899 ("the Act"), 30 Stat. 1151, 33 U.S.C.

[1] Section 10 generally forbids the creation of unauthorized obstructions in the navigable waters of the United States.

403.[2] The litigation involves a small strip of tidal marsh along Richardson Creek, a tributary of the Wilmington River, one of the major tidal rivers of Chatham County, Georgia.

Beginning shortly after his acquisition of the marshland in 1965, petitioner gradually filled the property in order to create enough fast land to obtain a county building permit for a house (Pet. 3, 4). In 1965, petitioner applied for a permit to build a dock on the property but did not apply for a permit to fill the land (Pet. 3). The United States Army Corps of Engineers, which is charged with enforcement of the Rivers and Harbors Act, first became aware of the fill activity during a routine inspection of Richardson Creek in June 1972. On at least three subsequent occasions, representatives of the Corps of Engineers or the State of Georgia advised petitioner that his filling of the marshlands was unauthorized and illegal (Ga. App., pp. 6b-7b).[3] Petitioner disregarded these warnings, and the United States instituted this action seeking a permanent injunction against further filling of the tidal lands and a mandatory injunction requiring removal of the fill material. On April 17, 1974, the district court found that

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[2] The State of Georgia later intervened in the action, seeking a permanent injunction against further filling or altering of tidal marshlands.

[3] The petition does not reproduce the opinions of the district court and the court of appeals. They are included as Appendices to the Brief in Opposition filed by respondent State of Georgia.

Richardson Creek was within the navigable waters of the United States to the mean high tide line and that the area filled by petitioner would have been inundated at high tide. It therefore held that the marshland was subject to Section 10 of the Act (Ga. App., pp. 7b, 10b). The district court permanently enjoined petitioner from any further fill or construction operations on this property.[4] The United States Court of Appeals for the Fifth Circuit affirmed, concluding that neither of these factual findings was clearly erroneous (Ga. App., pp. 4a-5a).

Petitioner claims (Pet. 6) that the Corp of Engineers lacked jurisdiction over Richardson Creek under Section 10 of the Act because it was not navigable as a matter of law, since it allegedly carries no commerce. But the navigable waters of the United States have historically included, but are not limited to, those lands subject to the ebb and flow of the tides. *The Daniel Ball*, 10 Wall. 557; *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454-456. In

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[4] The district court held that petitioner's filing for an after-the-fact permit to fill this property precluded the awarding of mandatory injunctive relief, pending completion of the administrative proceedings and any appeal therefrom (Ga. App., pp. 11b-12b). See *United States* v. *Joseph G. Moretti, Inc.*, 478 F.2d 418 (C.A. 5). The district court has therefore abstained from granting a mandatory injunction and has retained jurisdiction in this case (Ga. App., p. 13b). The Corps of Engineers denied the permit on March 26, 1974 (Ga. App., pp. 2b-3b). On August 28, 1975, petitioner instituted an action in the United States District Court for the Southern District of Georgia entitled *Diamond* v. *United States, et al.*, No. 475-221, seeking review of that determination.

tidal estuaries, therefore, the navigable waters include all lands below the line of the mean high tide.[5] *United States* v. *Stoeco Homes, Inc.*, 498 F. 2d 597, 610 (C.A. 3), certiorari denied, 420 U.S. 927; *United States* v. *Joseph G. Moretti, Inc.*, 478 F. 2d 418 (C.A. 5). See also 33 C.F.R. 209.260(k)(1) and (2).

Here, the evidence established that Richardson Creek was navigable and that the mean high tide line was well shoreward of the area filled by petitioner (Ga. App., pp. 4b, 7b). The court of appeals upheld these findings (Ga. App., pp. 4a-5a), and there is no reason for further review by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[5] The rights of the riparian property owner are subject to the paramount federal navigational servitude. *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, 435; *Zabel* v. *Tabb*, 430 F.2d 199 (C.A. 5), certiorari denied, 401 U.S. 910.

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